

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of)

Request for Review by)

CONNECT2 INTERNET NETWORK, INC.)

of Decision of Universal Service)
Administrator)

CC Docket No. 02-06

471 Application No. 145391

Funding Request No. 235038

Funding Request No. 235043

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REQUEST FOR REVIEW AND PETITION FOR WAIVER

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SUMMARY

The Commission should grant review of the captioned decisions by the Universal Service Administrative Company ("USAC") dismissing as untimely Connect2 Internet Network Inc.'s ("Connect2") appeals of recovery demands issued by the Schools and Libraries Division ("SLD") of USAC with respect to the Funding Requests and schools listed in Exhibit 1 hereto. USAC apparently based its determination of untimeliness on the date of Commitment Adjustment Letters purportedly sent to Connect2 on April 1, 2004, but Connect2 has no record of receiving any CALs with respect to the funding requests and schools at issue here. In fact, USAC's failure to provide any explanation for its recovery demands was one of the bases for Connect2's appeal. Contrary to USAC's determination, the appeals were timely filed within 60 days of the Recovery/Offset Demand Letters ("RODLs") issued by SLD -- the actions by which Connect2 was aggrieved.

In any event, the Commission should grant a waiver of any applicable filing deadline in order to consider the merits of Connect2's appeal. Connect2's participation in the E-Rate Program at numerous schools in New York and New Jersey (including St. Augustine School) already has been the subject of a criminal prosecution by the United States Department of Justice ("DOJ"). That prosecution, in which USAC and the Commission's Office of Inspector General ("OIG") actively participated, resulted in a plea agreement that provides, among other things, for a civil forfeiture of \$290,000, an amount which DOJ determined to represent "the amount of proceeds obtained as a result of the offense." Having determined that the claims against Connect2 involved an "indication of fraud, the presentation of a false claim, or a misrepresentation," the Commission was required to, and did, turn these matters over to DOJ for

prosecution and cannot now revisit those claims in the form of the recovery actions based on rules and procedures adopted in the intervening years.

Connect2 and Mr. Angelides already have paid a huge price for their misconduct in the Schools and Libraries program. Connect2 is essentially out of business and Mr. Angelides, a 67 year old man who previously had no problems with the law and was well respected in his community, has pleaded guilty to felony charges, agreed to a substantial forfeiture, been debarred from the Schools and Libraries Program, and been diagnosed with terminal cancer. USAC's current recovery efforts are excessive and inequitable in that they seek recovery from Connect2 of more than \$2,600,000 in funds used to provide equipment and services to the listed schools, but Connect2 has not been informed of the basis for those demands. In the only case in which Connect2 has been provided any information regarding the basis for SLD's demands, an audit report for one of the schools was provided to Connect2 five months **after** the RODLs were issued and nearly one month **after** USAC has dismissed Connect2's appeal.

For the foregoing reasons, the Commission should grant review of the USAC Decisions, consider the merits of Connect2's appeal, and exercise its discretion to terminate collection efforts with respect to these claims. At a minimum, due process requires that Connect2 be afforded notice of the basis for, and an opportunity for hearing with respect to, the recovery demands at issue here.

REQUEST FOR REVIEW AND PETITION FOR WAIVER

Connect2 Internet Networks, Inc. ("Connect2"), by counsel and pursuant to Sections 54.719 through 54.721 of the Commission's Rules, hereby requests review of the above-captioned decisions by the Universal Service Administrative Company ("USAC") dated October 26, 2004 ("USAC Decisions"), dismissing without consideration Connect2's appeals of Repayment/Offset Demand Letters ("RODLs") and related actions by the Schools and Libraries Division ("SLD") of USAC seeking repayment by Connect2 of \$72,238 with respect to the two funding requests listed in Exhibit 1 attached hereto ("Funding Requests") for Funding Year 1999 ("FY 1999") at Immaculate Conception School ("ICS"). USAC dismissed Connect2's appeal on the grounds that the appeal was "postmarked more than 60 days after your Commitment Adjustment Letter was issued," completely ignoring the fact that one of the bases for Connect2's appeal was that it had not received Commitment Adjustment Letters ("CALs") with respect to ICS. Pursuant to Section 1.3 of the Commission's Rules, Connect2 also hereby petitions for waiver of the 60-day period within which to appeal USAC's demands, to the extent that such waiver is required in order for USAC or the Commission to consider the substantive merits of Connect2's appeals.

The Commission should grant review, reverse the USAC Decisions and consider the substantive merits of Connect2's appeal because the appeals were not untimely and: (a) Connect2's involvement in the E-Rate Program at this and numerous other schools in New York and New Jersey already has been the subject of a criminal prosecution by the United States Department of Justice ("DOJ") -- with the knowledge, participation and cooperation of USAC and the Commission's Office of Inspector General ("OIG") -- in which a compromise on this and other claims was reached in the form of a plea agreement and civil forfeiture over 18 months

ago; (b) the determination to treat these matters as fraudulent claims by Connect2 required the claims to be transferred to the DOJ, effectively depriving the Commission of jurisdiction over them; (c) Connect2 has been denied due process with respect to the SLD claims; (d) the amounts specified in the SLD Letters are inconsistent with the results of an audit of the E-Rate Program at ICS performed by the OIG earlier this year; and (e) the amount involved in Funding Request Number (“FRN”) 235038 is de minimis in any event and collection will require expenditure of amounts far exceeding the amount at issue.

Background

On June 16, 2004, SLD sent a RODL, addressed to “Mr. John Angelides, Connect2 Internet Networks, Inc., 26 Bay Street, Staten Island, New York,”¹ demanding repayment from Connect2 of \$16,065 in funds disbursed for FY 1999 for equipment and services at ICS (the “FRN 235038 RODL”). A copy of the FRN 235038 RODL is annexed as Exhibit 2. Although the RODL stated that “you were recently sent a Commitment Adjustment Letter informing you of the need to recover funds for the Funding Request Number(s)...attached to this letter,” Connect2 has no record of ever receiving a CAL with respect to FRN #235038. The first correspondence from SLD on this matter was the June 16, 2004 RODL demanding recovery of \$16,065 without providing any explanation for the basis of SLD’s recovery demands.

On the same day, SLD sent another RODL concerning ICS to Mr. Angelides at the same address, seeking repayment by Connect2 of \$56,173.00 for FY 1999 for FRN 235043 (“FRN 235043 RODL”), a copy of which is attached as Exhibit 3. That RODL also stated that

¹ On December 23, 2003, Mr. Angelides had been debarred by the Commission and was expressly prohibited from engaging in any activities “associated with or related to the schools and libraries support mechanism, including the receipt of funds or discounted services through the schools and libraries support mechanism, or consulting with, assisting or advising applicants or service providers regarding the schools and libraries support mechanism.” See Notice of Debarment, File No., DA 03-4088, 18 FCC Rcd. 26722 (December 23, 2003) (“Angelides Debarment Notice”).

“you were recently sent a Commitment Adjustment Letter informing you of the need to recover funds” with respect to FRN 235043. Connect2 has no record of receiving a CAL for FRN 235043 either.

However, on March 31, 2004, SLD apparently sent a “Recovery of Erroneously Disbursed Funds Letter” regarding FRN 235043 to Mr. Angelides at the Staten Island address set forth above (“March 31 Letter”). A copy of the March 31 Letter is annexed as Exhibit 4. Among other things, that letter stated that “during the course of an audit” performed by unidentified persons at an unspecified time, SLD had determined that “funds were disbursed for products that were not delivered” to ICS and that “wiring and integration costs...paid by SLD...was [sic] not commensurate with the work performed.” March 31 Letter at 5. The letter further stated that SLD was “also sending this information to the applicant” and that “based on these [audit] findings, SLD is seeking recovery of these erroneously disbursed funds.” *Id.* at 2, 5. SLD did not specify how or from whom it intended to recover the funds, not did it provide Connect2 with a copy of the audit report that apparently formed the basis for the March 31 Letter and the RODLs (collectively, the “SLD Letters”). In fact, SLD did not provide Connect2 with a copy of any audit report concerning ICS, or any other information regarding the audit, until late November 2004, nearly eight months *after* the March 31 Letter, five months *after* the RODLs and one month *after* USAC had dismissed Connect2’s appeal as untimely without consideration on the merits. See SLD Letter dated November 23, 2004 to Connect2 Internet Networks, Inc., Attn: John Angelides “Re: Beneficiary Audit,” a copy of which annexed as Exhibit 5, along with the accompanying Report on Audit of the E-Rate Program at Immaculate Conception School, Report No. 02-AUD-02-04-020 (March 24, 2004) (“Audit Report”).²

² A copy of the Audit Report is included in Exhibit 5. Also included in Exhibit 5 are related memoranda: (a) from the Chief of the Wireline Competition Bureau to the Inspector General dated March 17, 2004 (“Maher Memo”); (b)

The ICS audit apparently was one of approximately 14 audits of E-Rate Program beneficiaries conducted by OIG. See Schools and Libraries Universal Service Support Mechanism, Fifth Report & Order, FCC 04-190, 19 FCC Rcd. 15808 (2004) (“Schools and Libraries Fifth R&O”) at ¶8 and n. 18. Those and other audits eventually led the Commission to revise and extend its oversight of, and supplement the recovery procedures applicable to, the E-Rate Program. Specifically, the Commission acknowledged in August 2004 that it had “not comprehensively addressed the question of what recovery procedures would be appropriate in situations where it is determined that funds have been disbursed in violation of particular programmatic rules that do not implicate statutory requirements,” and concluded that it needed to “refine and extend our recovery procedures.”³ See Schools and Libraries Fifth R&O, at ¶16. Among other things, the Commission concluded that the recovery procedures applicable to disbursements made in violation of the Telecommunications Act also should be applied by USAC to disbursements in violation of Commission rules and that in cases involving equipment and service changes, the “appropriate amount to recover is the difference between what was originally approved for disbursement and what would have been approved had the entity requested and obtained authorization for a service substitution.” *Id.* at ¶¶13, 15, 23.

When it sent the SLD Letters to Mr. Angelides at the address set forth above, SLD and USAC knew or should have known that: (a) Mr. Angelides had been debarred in 2003 from all activities relating to the schools and libraries program (see note 1, supra); and (b) Connect2’s involvement in the schools and libraries program at schools in New York and New

from the Managing Director to the Inspector General dated March 22, 2004; and (c) from the Inspector General to the Chairman dated March 24, 2004 (“Feaster Memo”).

³ The Commission previously had adopted a plan for recovery of funds distributed in violation of the Telecommunications Act of 1996, specifically where funding had been committed for “ineligible services” or for “services provided by non-telecommunications carriers” in violation of Section 254 of the Communications Act. See Schools and Libraries Universal Service Support Mechanism, Third Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd. 26912 (Dec. 23, 2003) at ¶79, n. 164.

Jersey already had been the subject of a criminal prosecution by DOJ (in which USAC and OIG had cooperated), resulting in a plea agreement with Mr. Angelides which included a civil forfeiture of \$290,000, representing “the approximate amount of the proceeds obtained as a result of the offense.” On or about December 17, 2002, Mr. Angelides had been arrested pursuant to an eight-count criminal complaint which alleged, among other things, that Mr. Angelides, acting on behalf of Connect2, had engaged in a scheme to defraud the E-Rate Program and that “the Government actually paid C2I more than \$9 million in E-rate monies for goods and services that C2I provided to approximately 36 schools” in the New York/New Jersey area. See United States of America v. John Angelides, et al., Complaint, sworn to by FBI Special Agent Courtney Foster on December 17, 2002, at ¶¶17-18. A copy of the Complaint is annexed as Exhibit 6.

Both USAC and the Commission participated in the prosecution efforts. The Complaint expressly states that USAC provided the FBI and DOJ with “documents and materials” and other information about Connect2’s activities and involvement in the E-Rate Program. See, e.g. Complaint at ¶16 (“I have spoken with an attorney employed by a private, not-for-profit company called [USAC], and have reviewed documents and materials provided to me by that attorney and her staff”) and ¶18 (“According to USAC records...the Government actually paid C2I more than \$9 million in E-Rate monies for goods and services that C2I provided to approximately 36 schools.”). The Commission’s OIG also participated in the prosecution efforts. See Office of the Inspector General, Semiannual Report to Congress, October 1, 2002 - March 31, 2003 (“2003 OIG Report”) at 7 (discussing audit support provided by OIG auditors for DOJ regarding an “ongoing criminal investigation” involving a service provider that “received more than \$9 million in E-Rate Funds for goods and services provided to

approximately 36 schools” between July 1998 and June 2001). When Mr. Angelides was arrested, all of Connect2’s records regarding its dealings with USAC, the schools (including ICS) and the E-Rate Program were seized by the FBI and have never been returned.

On May 22, 2003, Mr. Angelides pleaded guilty to Count 1 of the Felony Information (“Information”) against him and admitted to the Forfeiture Allegation in that Information. Among other things, Count 1 of the Information states that “from July 1998 to the present, Connect2 was the vendor of goods and services for more than 200 schools participating in the E-rate Program” and that Mr. Angelides had devised and carried out a “fraudulent scheme” by which Connect2 obtained E-rate funds to provide goods and services to those schools. A copy of the Information is annexed as Exhibit 7. The Forfeiture Allegation of the Information stated that Mr. Angelides was to forfeit to the United States pursuant to Title 18, United States Code, Section 981(a)(1)(c) and other provisions “a sum of money equal to approximately \$290,000...representing the amount of proceeds obtained as a result of the offense.” Information at 10-11.

The guilty plea was entered pursuant to a written plea agreement with the DOJ acting through the United States Attorney for the Southern District of New York, which stated among other things that “neither the defendant nor Connect2 Internet Networks, Inc. will be further prosecuted criminally by this Office...for participating, from in or about the Fall of 1999 through in or about October 2002, in a scheme to defraud the Federal Government’s E-Rate school and library funding program through the submission of false, fraudulent and misleading claims and statements, as charged in the Information.” See Plea Agreement, a copy of which is annexed as Exhibit 8, at 1. When the plea agreement was entered into, there were no outstanding

demands against Connect2 or Mr. Angelides for further repayment or recovery by USAC or the Commission.

Weeks after he pleaded guilty, Mr. Angelides was diagnosed with Stage IV metastasized non-small cell lung cancer, which has spread to his brain. He is terminally ill and continues to receive treatment at the Memorial Sloan-Kettering Cancer Center. Judge Griesa, who presided over the criminal proceedings, has postponed sentencing based on Mr. Angelides' medical condition, with the acquiescence of the U.S. Attorney's Office. Copies of medical reports and status reports to the court attesting to Mr. Angelides' condition and the postponement of his sentencing are annexed as Exhibit 9.

Notwithstanding Mr. Angelides' guilty plea, the civil forfeiture amount agreed to by DOJ, and Mr. Angelides' debarment, USAC began sending recovery demand letters in 2004 addressed to Mr. Angelides for Connect2 concerning the same E-Rate Program activities that were encompassed within the criminal prosecution and plea agreement. The RODLs at issue here are among more than 25 demands to Connect2 seeking total recoveries of nearly \$5,000,000. Connect2 submitted a letter to USAC on July 20, 2004 appealing the recovery demands against Connect2 set forth in the RODLs. A copy of Connect2's July 20, 2004 appeal letter to USAC ("Appeal Letter") is annexed as Exhibit 10. On October 26, 2004, USAC sent Connect2 an Administrator's Decision on Appeal ("Administrator's Decision") which dismissed the July 20, 2004 appeal without consideration, concluding that the appeal was untimely because it "was postmarked more than 60 days after the date your Commitment Adjustment Letter was issued," despite the fact that no Commitment Adjustment Letter was ever received. See, e.g. USAC Decision Letter dated October 26, 2004 regarding ICS, Application No. 145391, Funding Year 1999-2000, at 1. Connect2 respectfully requests the Commission to review the USAC

Decisions, grant a waiver of the 60 day rule if necessary, consider Connect2's appeal on the merits, and cease collection efforts with respect to the SLD Letters.

Argument

I. Connect2's Appeal To USAC Was Not Untimely

Although SLD sent separate RODs for each of the two FRNs at issue here, USAC sent only one Administrator's Decision letter, dated October 26, 2004, to Connect2 dismissing Connect2's appeal without consideration:

Our records show that your appeal was postmarked more than 60 days after the date your **Commitment Adjustment Letter** was issued, as shown above. Federal Communications Commission (FCC) rules require applicants to postmark appeals within 60 days of the date on the decision letter being appealed. FCC rules do not permit the SLD to consider your appeal.

See Decision Letter at 1 (emphasis added). The Commission should review and reverse the USAC Decision because: (a) Connect2 never received CALs regarding ICS; (b) notices sent by SLD to Mr. Angelides months after he was debarred from all activities relating to the schools and libraries program cannot be relied upon to provide timely notice of SLD's claims against Connect2 concerning that program; (c) the USAC decisions applied the wrong standard in finding the appeal untimely; (d) a waiver of the 60-day rule is warranted under the circumstances presented here; and (e) the substantive merits of Connect2's appeals warrant consideration by the Commission in any event.

A. Correspondence Sent To Mr. Angelides After His Debarment Can Not Be Relied Upon To Provide Notice To Connect2

Mr. Angelides was debarred by the Commission in December 2003 from all "activities associated with and related to the schools and libraries support mechanism," including "consulting with, assisting or advising applicants or service providers regarding the schools and

libraries support mechanism.” Angelides Debarment Notice, 18 FCC Rcd. at 26722. That debarment did not apply to Connect2. Id. Nevertheless, months after his debarment, SLD apparently attempted to provide notice to Connect2 of its decision to seek recovery of certain funds by sending the SLD Letters to Mr. Angelides (see Exhibits 1-3). USAC then relied exclusively upon the efficacy of that “notice” in dismissing Connect2’s appeal for failure to file within 60 days of the date of the “Commitment Adjustment Letter” that Connect2 never received. Having debarred Mr. Angelides, SLD and USAC cannot now rely upon correspondence sent to him months after his debarment as sufficient to provide notice to Connect2.

B. Connect2 Was Not “Aggrieved” Until The RODLs Were Issued.

Section 54.719(a) of the Commission’s Rules states that any “person aggrieved by an action taken by a division of the administrator” may seek review of that decision at USAC. Section 54.720 provides that a request for review must be filed within sixty days of the issuance of the decision by which the person was aggrieved. Although USAC dismissed Connect2’s appeal because it was “postmarked more than 60 days after the date of your Commitment Adjustment Letter was issued,” Connect2 was not aggrieved until SLD sought recovery of funds from Connect2 in the RODLs.

Contrary to USAC’s Decision, Connect2 did not receive a CAL with respect to either of the Funding Requests that are the subject of the RODLs. In fact, the failure to receive any explanation for SLD’s recovery demands at certain schools, including ICS, was one of the bases for Connect2’s appeal. See Appeal Letter, Exhibit 10 at 2. The March 31 Letter cannot provide adequate notice to Connect2 to trigger its obligation to appeal the decision to recover funds when the letter: (a) failed to provide a copy of the audit report or any other information

concerning the audit upon which the decision was based; (b) never stated that the recovery efforts would be directed at Connect2 rather than the school (which apparently also was sent a copy of the March 31 Letter) or other parties; and (c) made no mention of FRN 235038. Connect2 became “aggrieved” only when SLD sent the RODLs to Connect2 demanding that Connect2 repay funds without providing any information about the audit that formed the basis for those demands. Connect2 filed a timely appeal of the RODLs.

C. Good Cause Exists For Waiver Of the 60 Day Filing Period

Good cause exists for waiver of the 60 day rule and substantive consideration of the merits of Connect2’s appeal. Not only was the March 31 Letter concerning Connect2 sent to Mr. Angelides months after he was debarred, it was sent at a time when USAC knew or should have known that Mr. Angelides was undergoing extensive medical treatments for lung cancer which had spread to his brain. Both USAC and the Commission actively cooperated with DOJ in the prosecution of Mr. Angelides and should have been aware of his medical condition -- which has led the presiding Federal Judge to postpone sentencing of Mr. Angelides with the consent of the U.S. Attorney’s office that prosecuted him. See Exhibit 8. Connect2’s Appeal Letter from counsel specifically informed USAC that Mr. Angelides “did not immediately bring the letters [from SLD] to our attention” due to his medical condition and that Connect2 had not received any explanation for certain of the demand letters it had received. Connect2 should not be penalized because USAC elected to send correspondence to Mr. Angelides after his debarment while he was undergoing cancer treatment.

The public interest also warrants a waiver of the procedural deadline (if necessary) and substantive consideration of the issues raised in Connect2’s appeal. The Commission has stated that “if there are unique reasons why a particular entity believes recovery

for a rule violation is inappropriate, that party is always free to present such information in seeking review of USAC's decision to recover monies, pursuant to section 54.722" of the rules. See School and Libraries Fifth R&O at ¶29 (emphasis added).⁴ See also Federal-State Joint Board On Universal Service, Order on Reconsideration and Fourth Report and Order, 19 FCC Rcd. 15252 (July 2004) at ¶10, n.30 ("any service provider is free to challenge *a recovery action directed to it* if the time frame for seeking an appeal from USAC or the Commission has not yet run.") (emphasis added). As set forth herein, there are unique and substantial reasons why USAC's efforts to collect the funds sought from Connect2 are inappropriate under the circumstances presented here. USAC's collection efforts present "novel questions of fact, law and policy," not just with respect to Connect2 and Mr. Angelides, but also with respect to their ultimate impact upon the schools and the overall goals and objectives of the Schools and Libraries program.⁵ The Commission should not rely on USAC's erroneous interpretation of the filing requirements in sections 54.719 and 54.720 to avoid consideration of these issues on the merits, particularly where: (a) USAC's calculation of the applicable deadline is based on the questionable premise that correspondence sent to Mr. Angelides after his debarment constituted effective notice to Connect2; and (b) SLD did not provide a copy of the relevant audit report to Connect2 until months after the March 31 Letter and the RODLs had been issued and nearly one month after USAC had dismissed its appeal. Thus, Connect2 respectfully requests a waiver of

⁴ Among other things, Section 54.722 states that "requests for review that raise novel questions of fact, law or policy" shall be considered by the full Commission.

⁵ As the Court of Appeals noted more than 30 years ago, "sound administrative procedure" requires an agency "to take into account considerations of hardship, equity or more effective implementation of overall policy" in evaluating requests for waiver of its rules. The "combination of a general rule and limitations is the very stuff of the rule of law, and with diligent effort and attention to essentials administrative agencies may maintain the fundamentals of principled regulation without sacrifice of administrative flexibility and feasibility." WALT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

the filing periods set forth in Section 54.720, to the extent that such waiver is required to allow substantive consideration of the merits of its appeal.

II. Connect2's Involvement In The E-Rate Program Already Was The Subject Of A Prosecution By DOJ And A Plea Agreement

The SLD Letters and the USAC Decisions are part of an administrative process developed by USAC and the Commission to identify and recover, pursuant to the Federal Debt Collection Improvement Act ("DCIA"), funds disbursed in violation of Section 254 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). See Schools and Libraries Fifth R&O at ¶15. However, the Commission's rules expressly state that claims "in regard to which there is an indication of fraud, the presentation of a false claim, or a misrepresentation on the part of the debtor...shall be referred to the Department of Justice ("DOJ") as only the DOJ has authority to compromise, suspend or terminate collection action on such claims." See 47 C.F.R. §1.1902(c) (emphasis added). In this case, DOJ already has investigated and prosecuted claims of fraud against Mr. Angelides which included the activities that are the subject of the SLD Letters. See Complaint at ¶¶16, 18; 2003 OIG Report at 7. In fact, in December 2002 the FBI seized Connect2's records regarding ICS in furtherance of that prosecution.

DOJ agreed to compromise those claims in May 2003 in return for a guilty plea from Mr. Angelides and an agreement to pay a civil forfeiture in the amount of \$290,000, which DOJ determined to be "the approximate amount of the proceeds obtained as a result of the offense charged in Count One of the Information." See Information, Exhibit 7 at 11; Plea Agreement, Exhibit 8 at 1. Both USAC and OIG assisted and cooperated in that prosecution, providing DOJ with access to documents, materials, audit services and other information regarding Connect2. In return for the guilty plea and the agreement to pay \$290,000, DOJ

agreed that it would not further prosecute Mr. Angelides or Connect2 “for participating, from in or about the Fall 1999 through in or about October 2002, in a scheme to defraud the Federal Government’s E-Rate schools and library funding program through the submission of false, fraudulent and misleading claims and statements...” Plea Agreement at 2. Given the mandatory referral language of §1.1902(c) of the Commission’s Rules, the direct involvement of USAC and OIG with DOJ in bringing the complaint, and the compromise already effected by DOJ in the plea agreement, USAC and the Commission cannot now revisit the terms of the compromise with DOJ by seeking recovery of additional funds from Connect2 based on rules and procedures adopted in the interim.

III. Connect2 Has Been Denied Due Process With Respect To The SLD Claims

Connect2 has been denied due process from the outset with respect to the recovery demands being asserted by USAC for ICS. USAC dismissed Connect2’s appeal of the demands set forth in the RODLs because the appeal was “postmarked more than 60 days after the date of your Commitment Adjustment Letter was issued.” However, as set forth above, Connect2 never received any CALs with respect to these recovery demands -- in fact, that was one of the issues raised in its appeal.

USAC cannot rely on the March 31 Letter to justify its dismissal of Connect2’s appeal on the basis of timeliness. That letter did not apply to the recovery demands set forth in the FRN 235038 RODL. With respect to the payment demands set forth in the other RODL, the March 31 Letter apparently was based on an audit that determined that funds had been disbursed for services and “products that were not delivered.” However, Connect2 was not provided with a copy of the Audit Report until **after** USAC already had dismissed Connect2’s appeal. That Audit Report shows that the audit was conducted after Connect2 had been replaced by another

service provider at ICS. ICS apparently told OIG auditors that it requested a service provider change from Connect2 to Elite Systems, Inc. ("Elite") "based on recommendations from other archdiocesan schools." See Audit Report at 10. Although USAC and OIG have information about possible conflicts of interest between Elite and one or more consultants working for the Archdiocese,⁶ Connect2 was never afforded a timely opportunity to review the audit findings, to examine the auditors to determine what information and documents they relied upon to reach their conclusions (or even to determine when they conducted their audit), or how they calculated the amount of funds to be recovered. Likewise, Connect2 was never afforded an opportunity to question other parties as to other possible explanations for the alleged violations.

At a minimum, Connect2 should be afforded a hearing and an opportunity to conduct discovery to explore alternative explanations for the missing equipment and substituted services at the school,⁷ including any role that might have been played by the other service provider or any "consultant" for the Archdiocese with whom the service provider was "connected." While copies of the Audit Report apparently were provided to USAC, the Chief of the Wireline Competition Bureau and the principal of ICS in March 2004, a copy was not provided to Connect2 until the end of November -- nearly a month after Connect2's appeal to USAC was dismissed without consideration.

⁶ For example, an OIG Audit of St. Augustine School (like ICS, also located in the Archdiocese of New York) states that the school had changed service providers in FY 2000 "at the recommendation of a consultant that worked for the Archdiocese" who OIG subsequently discovered to also be "connected to Elite Systems, by either family or ownership, while working for the Archdiocese." See Report on Audit of the E-Rate Program at St. Augustine School, Report No. 02-AUD-02-04-017, p. 7-8 (May 19, 2004), annexed hereto as Exhibit 11. The auditors specifically stated that they were "not able to determine if this connection [between the consultant and the new service provider] resulted in unfair or unethical practices on the part of Elite Systems," at the St. Augustine School. Id. at 8.

⁷ For example, the Commission did not codify rules regarding service substitutions and prohibiting the transfer of equipment from one school to another until December 2003. See Schools and Libraries Universal Service Support Mechanism, Third Report and Order, 18 FCC Rcd. 26912 (Dec. 2003) at ¶¶25-30, 43.

Finally, the audit materials recently provided by SLD indicate that the only procedural avenues available currently to Connect2 to contest SLD's recovery demands require Connect2 to submit appeals and/or requests for review of those demands to the very same authorities who decided to issue the demands in the first place. See 47 C.F.R. §§54.719 and 54.722. Correspondence among OIG, the Wireline Competition Bureau, the Commission and USAC indicates that USAC and the Wireline Competition Bureau already have prejudged the issue of Connect2's responsibility for the alleged missing equipment and service substitutions notwithstanding the passage of time and the intervening activities of the school and the service provider that replaced Connect2. The Audit Report recommended that "the Wireline Competition Bureau direct the Universal Service Administrative Company (USAC) to recover \$68,846 disbursed on behalf of ICS in funding years 1998, 1999 and 2000" a recommendation in which the Wireline Competition Bureau expressly concurred. See Feaster Memo and Maher Memo, copies of which are included in Exhibit 5.

IV. The Amounts Sought By SLD Are Inconsistent With The Findings Of The OIG Audit

According to the Audit Report of the E-Rate Program at ICS, the objective of the audit "was to assess the beneficiary's compliance with the rules and requirements of the USF program." See Feaster Memo at 1 (emphasis added). Aside from the fact that SLD's reliance upon the OIG audit of ICS's compliance as the basis for its recovery demand letter issued to Connect2 is inconsistent with the express purposes of the audit, the amounts sought by SLD from Connect2 are inconsistent with the Audit Report. The Audit Report identified "potential fund recoveries" totaling \$68,846 for funding Years 1998 through 2000 and recommended "that the Wireline Competition Bureau direct the Universal Service Administration Company (USAC) to recover \$68,846 disbursed on behalf of ICS in FYs 1998 through 2000." See Feaster Memo at 1.

Nevertheless, SLD's repayment demands against Connect2 for ICS during **FY 1999 alone** total \$72,238. See FRN #235038 June 16 RODL (\$16,065) and FRN #235043 June 16 RODL (\$56,173). For example, the Audit Report concluded that internal connections equipment purchased with E-rate funds was missing, resulting in overpayments of \$33,060 for FY 1998 and FY 1999 **combined**. See Audit Report at 6. However, SLD apparently is demanding repayment of \$36,733 from Connect2 for FY 1999 alone. See March 31 Letter at 5. Connect2 has not been provided with any explanation for the inconsistencies between the OIG Audit findings and recovery recommendation and the ultimate demand by SLD.

V. The Amounts Involved In The FRN 235038 RODL Are De Minimis

The Commission has concluded that "it does not serve the public interest to seek to recover funds associated with statutory or rule violations when the administrative costs of seeking such recovery outweigh the dollars subject to recovery." Schools and Libraries Fifth R&O at ¶35. With respect to at least one of the funding requests at issue here, FRN #235038, the total amount of recovery sought by SLD is less than \$17,000. There is no question that the administrative costs of pursuing to their ultimate conclusion the recovery efforts on this funding request will exceed \$17,000. The Commission has directed USAC "not to seek recovery of such de minimis amounts" under these circumstances and it should exercise its discretion to terminate collection activity with respect to this matter. See 47 C.F.R. §1.1916; Schools and Libraries Fifth R&O at ¶35.

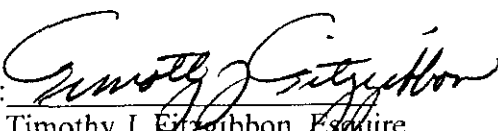
Conclusion

For the reasons set forth above, Connect2 respectfully requests the Commission to grant review of the USAC Decision, to waive the requirements of Section 54.720 of the rules if such waiver is necessary to consider the merits of its appeal, and to terminate collection activity with respect to the above-referenced funding requests. If the Commission decides to pursue collection, Connect2 respectfully requests an opportunity for hearing with respect to the recovery demands at issue here.

Date: December 27, 2004

Respectfully submitted,

CARTER LEDYARD & MILBURN LLP

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CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2004, a copy of the foregoing "Request for Review and Petition for Waiver" and certificate of service was sent via First Class Mail, postage prepaid, to:

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Universal Service Administrative Company
Schools and Libraries Division
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Whippany, New Jersey 07981

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Wireline Competition Bureau
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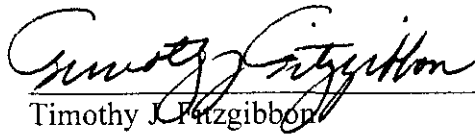

Timothy J. Fitzgibbon

Exhibit 1

APPLICANT NAME	FUNDING YEAR	FRN	FORM 471 NUMBER	RECOVERY DEMAND
Immaculate Conception School	1999-2000	235038	145391	\$16,065.00
Immaculate Conception School	1999-2000	235043	145391	\$56,173.00

